

STATE OF MICHIGAN
COURT OF APPEALS

ARTHUR SCHILL, SARAH SCHILL, DAVID
SCHUMACHER, and DIANE KANOUSE,

UNPUBLISHED
October 1, 2002

Plaintiffs-Appellees,

v

WASHTENAW INTERMEDIATE SCHOOL
DISTRICT,

No. 230356
Washtenaw Circuit Court
LC No. 99-010887-CZ

Defendant-Appellant.

Before: Markey, P.J., and Cavanagh and R. P. Griffin*, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiffs' motion for attorney fees and costs in this action brought pursuant to the Michigan Mandatory Special Education Act (MMSEA), MCL 380.1701 *et seq.* We reverse.

This action arose as a consequence of defendant denying that it was obligated to provide special education services to the plaintiff students allegedly because the students were not residents of Washtenaw County. Thereafter, plaintiffs filed this action alleging a violation of the MMSEA and requesting a declaration of defendant's obligations under the MMSEA, a restraining order, and injunctive relief. The parties eventually resolved the matter and a consent judgment was entered by the court. Subsequently, plaintiffs filed a motion for attorney fees and costs, claiming that "[t]he IDEA [Individuals with Disabilities Education Act, 20 USC § 1415 (i)(3)(B)], and by necessary implication the MMSEA, permits the recovery of reasonable attorney's fees by parties who have prevailed in proceedings instituted pursuant to its provisions." After apparently agreeing with plaintiffs, and finding that plaintiffs were the prevailing parties, the trial court granted plaintiffs' motion. Defendant now appeals.

Defendant first argues that plaintiffs were not entitled to attorney fees and costs because the MMSEA does not authorize such remedy. We agree. Although this argument was not specifically raised below, that issue was necessarily before the trial court and it presents a question of law for which the record is factually sufficient to address. See *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 326; 565 NW2d 915 (1997).

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

In Michigan, attorney fees are not recoverable as costs or damages unless specifically authorized by a statute, court rule, or recognized common-law exception. See *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999); *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994); *In re Complaint of Southfield*, 235 Mich App 523, 533-534; 599 NW2d 760 (1999). Here, plaintiffs do not dispute that the MMSEA does not include any provision authorizing an award of attorney fees. Plaintiffs argue, rather, that because of the “intertwined nature of IDEA and the MMSEA,” the attorney fees provision of the IDEA should authorize attorney fees for prevailing parties in a MMSEA action.

However, plaintiffs’ claim was brought under the MMSEA, not the IDEA. We have no basis in which to discern an intent by the Legislature to provide for the recovery of attorney fees under the MMSEA. As our Supreme Court recognized, “[t]he state statutes requiring special education, MCL 380.1701 *et seq.*; MSA 15.41701 *et seq.*, do not refer to, and are not dependent on, the corresponding federal law. If the federal government rescinded the IDEA, Michigan school districts would still have an obligation to provide special education under state law.” *Durant v Michigan*, 456 Mich 175, 193; 566 NW2d 272 (1997). Although the MMSEA closely follows the IDEA, clearly, if the Legislature intended to adopt the attorney fees provision of the IDEA it could have explicitly done so. See *Nemeth v Abonmarche Development, Inc*, 457 Mich 16, 42; 576 NW2d 641 (1998); see, also, *Warner v Independent Sch Dist No 625*, 134 F3d 1333, 1337 (CA 8, 1998) (“Minnesota could have authorized an award of attorneys’ fees under state law, but it has not done so.”); *John T v Marion Independent Sch Dist*, 173 F3d 684, 689 (CA 8, 1999) (“Iowa law does not authorize such an [attorneys’ fees] award.”). There may be laudable public policy reasons for permitting attorney fee awards with regard to actions brought under the MMSEA, but no such authorization exists under its provisions. Accordingly, the trial court’s award of attorney fees and costs to plaintiffs must be reversed. In light of our resolution of this dispositive issue, consideration of defendant’s other issues on appeal is not necessary.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin